IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1779

ROBERT L. CHAZIN,
Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

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Petitioner replies to the Brief of Respondents, filed on or about October 28, 1977.

I.

This Court Has Never Determined the Res Judicata Effect of a Prior State Court Judgment in Subsequent Section 1983 Litigation

Respondents assert that "In another apparent effort to make this Petition appear to have some merit, petitioner literally tosses out the suggestion that the res judicata effect of a prior state court judgment in a subsequent action under 42 U.S.C. § 1983 is the subject of conflicting decisions of the Court of

Appeals. See Petition at 8. . . . At no time has petitioner heretofore suggested, as he apparently does by citing *Lombard v. Board of Education*, 502 F. 2d. 631 (2d cir., 1974) that section 1983 actions override the command of statutory full faith and credit . . ." Respondents are incorrect. A suggestion that there is a conflict in decisions of the Courts of Appeals, and the reference to the *Lombard* case appears, for instance, on page 9 of Petitioner's opening brief in the Court of Appeals.

Respondents substantive assertion that there is, in fact, no conflict, and the implication that the law is settled in this area, is also inaccurate. In *Getty v. Reed*, 547 F. 2d 971 (6th cir., 1976), the Court (per Edwards, Circuit Judge) considered this question and said, in reversing a district court judgment:

> "If what we have said thus far suggests that the District Judge who held he had "no jurisdiction" to try this case simply missed the signs on a well marked trail, we hasten to acknowledge that no such thing is true. One commentator, Theis, has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in §1983 cases and added that as a result "the decisions of the lower courts teem with inconsistencies." Theis appended the following footnote to illustrate his point:
>
> *Compare Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 . . . (1974), *with Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 . . . (1976); *Roy v. Jones*, 484 F.2d 96 (3d Cir. 1973), *with Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 . . . (1970); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), *with Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 . . . (1971) (White, J., dissenting from denial of writ); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970), *with Mulligan v. Schlacter* . . . , 389 F.2d 231 (6th Cir. 1968); *Blankner v. City of Chicago*, 504 F.2d 1037 (7th Cir. 1974), *with Hampton v. City of Chicago*, 484 F.2d 602, 606 n.4 (7th Cir. 1973); *Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 [94 S.Ct. 1413, 39 L.Ed.2d 471] (1974), *with Ney v. California*, 439 F.2d 1285 (9th Cir. 1971)."
>
> Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L.Rev. 859, 865-66 & n. 35 (1976).

As pointed out in the Petition (at fn. 12, page 8), this Court has heretofore expressly declined to consider the question, which has been presented to it many times. *Huffman v. Pursue, Ltd.* 420 U.S. 592 (1975). And in *Preiser v. Rodriguez*, 411 U.S. 475, 509 (1973), Mr. Justice Brennan, in a dissenting opinion, observed:

> "In any case, we have never held that the doctrine of res judicata applies, in whole or in part, to bar relitigation under §1983, of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. . . ."

In sum, far from being settled, the uncertainty of the law in this area continues to generate conflicting decisions in the district courts and courts of appeals and has resulted in a large number of law review articles.[1] *Theis, supra.*

It is clear that should this Court decide that state judgments on federal constitutional questions are not res judicata in subsequent section 1983 actions, such a decision would be dispositive of that issue here. It would also seem clear that while Petitoner did not directly raise that iddue in the petition, it is one which is a ". . . subsidiary question, fairly comprised . . ." in Questions 1 and 2 of the petition, at least with reference to the subsequent section 1983 action which underlies the instant petition, *cf.* Rule 23(1)(c).[2]

[1] "For an analysis of these and other cases, see Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U.Colo.L.Rev. 191 (1972); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims. Part II*, 60 Va.L.Rev. 250 (1974) . . .; Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 Okla.L.Rev. 185 (1974); Note, *Relationship of Federal and State Courts*, 88 Harv.L.Rev. 453 (1974); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U.Ill.L.F. 95 . . ." *Theis, supra.*

[2] Respondents brief implies that the question is settled and not deserving of consideration. In Petitoner's view, not only is the question unsettled, pending a decision in this Court, it is also one of far reaching consequences, involving as it does conflicting policy considerations relating to the "accessibility" of the federal courts, and pending Congressional legislation. (S.B. 35, 95th Congress.) For these reasons, though the question is mentioned both in Petitioner's opening brief in the Court of Appeals and in the instant Petition, the point was not stressed.

II.

Neither the *Dills* nor *Sutphin* Cases Support Respondents' Contention That a California Declaratory Judgment Is Res Judicata as to Matters Unlitigated or Undeclared

A. Respondents' Authorities

Respondents rely, as they did in the Court of Appeals, on *Dills v. Delira*, 145 Cal. App. 2d 124, 302 P. 2d. 397 (1956) and *Sutphin v. Speik*, 15 Cal. App. 2d 195, 99 P. 2d 652 (1940) to support their contention that a California declaratory judgment is subject to the principles of res judicata applicable to judgments in general. They do not, however, proffer authority contrary to that contained in the Petition at 10.[3]

Dills, as remarked in the Petition (fn. 22.5, page 11) is inapposite. *Dills*, in fact, did not involve the question of res judicata at all, for the *Dills* case involved a single action. In *Dills*, the plaintiff sought a declaration that he and the defendants were associated in a partnership, and certain other relief, including an accounting. The language quoted by Respondents from *Dills*, (Brief of Respondents, 11) was used by the *Dills* court in reference to a situation, where in *one* action, a plaintiff, having been found not to be a member of a partnership, was not entitled to an accounting for the profits thereof, and was not to be permitted to relitigate his claim, *in the same action,* for different relief, by reason of the language contained in section 1062 of the California Code of Civil Procedure. But whatever the import of this

[3] Respondents assert (R.B., page 10, part 2) that "Contrary to petitioner's reading, *Lortz* [*Lortz v. Connell*, 273 Cal. App. 2d 286, 78 Cal. Rptr. 6 (1969)] does not stand for the proposition that res judicata has no application to actions tried in declaratory relief." This was not, however, Petitioner's reading. Rather, Petitioner asserted that "[a] (declaratory judgment does not preclude prevailing party from seeking damages in subsequent action) . . ." As Respondents admit (R.B. page 10), this holding, in itself, is a ". . . limited exception to res judicata." *Lortz* is thus consistent with Petitioner's contentions as to the res judicata effect of a California declaratory judgment and inconsistent with Respondents' position thereon.

language, it is wholly inapplicable to the case at bar, involving as it does the preclusive effect of a prior judgment. In sum, in *Dills*, no question of res judicata, collateral estoppel, or similar doctrine of judicial finality was involved.

Similarly, *Sutphin v. Speik* has no application to the case at bar. *Sutphin* did involve two actions, and the opinion in the second action, reported at 15 Cal. 2d 195, 99 P. 2d 652 (1940), a portion of which is quoted by Respondents at page 9, sets forth the general rule of res judicata applicable to judgments in general. But the prior judgment in *Sutphin* was not a declaratory judgment. Rather, as can be seen by inspection of the opinion in the first *Sutphin* case, *Sutphin v. Speik* 15 Cal. App. 2d 516, 59 P. 2d 611 (1936), it was an action for damages.[4] The rule set forth in the second Sutphin case, and quoted by Respondents, is fully applicable to such actions. Petitioner's prior state action (Petition, App. F) sought no damages.

B. Review of Decisions of the Court of Appeals on Controlling Questions of State Law

Respondents contend that a determination of local law made by the Court of Appeals is ordinarily accepted by this Court, and ought not, therefore to be disturbed. (Brief of Respondents at 12). This is indeed the general rule. But this policy was never intended to preclude the Court from granting certiorari to reverse a judgment of the Court of Appeals on a question of state law where federal rights are affected. Indeed, Rule 19(b) of this

[4] Although it is clear from a reading of the first *Sutphin* case that the action therein sounded in damages, the precise nature of the complaint is not set forth in the opinion of the District Court of Appeal. Petitioner has consulted the California State Archives in Sacramento, where both cases are presently on file. The first *Sutphin* action involved a complaint for money had and received. (Los Angeles Superior Court No. 364746; Court of Appeal (2d dist.) No. 2-Civil-10053. The Court may be interested to know that the second action involved a complaint and supplemental complaint styled the same way. (California Supreme Court No. L.A. 17142.)

Petitioner asks that the Court take judicial notice of these facts.

Court specifically lists a situation where a ". . . court of appeals has decided an important state . . . question in a way in conflict with applicable state . . . law . . ." as among those justifying, in the Court's sound discretion, grant of the writ. Moreover, this Court has previously considered questions of state law when federally conferred rights were affected or involved, *cf. Brown v. Western Railway* 338 U.S. 294 (1949); on at least one occasion, it has even reversed a judgment of a state supreme court interpreting that state's constitution. *West Virginia ex rel. Dyer v. Sims* 341 U.S. 22 (1951).

C. Unsettled Questions of State Law Render an Action Suitable for Abstention

In Petitioner's view, Petitioner's position on the question of the preclusive effect of a California declaratory judgment is an accurate statement of California law. Should the Court feel that the question requires further elucidation, Petitioner urges, as he did in the Court of Appeals, that the appropriate course of action is reversal, remanding the cause to the District Court, with directions to retain jurisdiction and to abstain while the questions of state law are litigated in state court, as was done in the *Garfinkle* case (Petition at 6.)[5] See *Carey v. Sugar*, 425 U.S. 73 (1976).

This, Petitioner suggests, is preferable to an affirmance of the judgment of dismissal which operates to deprive Petitioner of his right to a federal adjudication of federal constitutional questions, *cf. England v. Louisiana Board of Medical Examiners* 375 U.S. 411 (1964).

[5] *Garfinkle v. Wells Fargo Bank*, 483 F. 2d 1074 (9th cir., 1973). The California Supreme Court has ordered a hearing in the subsequent Garfinkle case to decide questions of state action and due process similar to those presented by questions 3 and 4 of the instant petition. Petitioner has filed a motion in this Court, requesting that consideration of the instant petition be deferred pending the decision in that case.

III.
The Disposition of Petitioner's Prior State Court Proceeding in the State Appellate Courts Does Not Render the Judgment Therein Res Judicata as to the Constitutional Questions Presented Here.

Respondents now contend, *for the first time*, that the disposition of Petitioner's prior state court proceedings in the state appellate courts is an additional and further ground for the assertion that the judgment is res judicata on the constitutional questions presented here and in the Court of Appeals. Brief of Respondents at 7.

Respondents had the opportunity to present this particular claim to the Court of Appeals and did not do so. They are, accordingly, precluded from presenting it here. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967).

Consideration of this assertion on the merits does not compel a different result. Under California law, it is well settled that summary denials of petitions for hearing by the California Supreme Court are not res judicata for any purpose. *People v. Davis*, 147 Cal. 346, 81 P. 718 (1905).

Nor does the fact that the issue of due process (but not state action) was briefly mentioned in Petitioner's brief, filed in the state Court of Appeal render the judgment of the superior court res judicata on the constitutional questions.[6] As can be seen by inspection of the superior court complaint (Petition, App. F), no constitutional issues were presented therein. The constitutional question was therefore unnecessary to the disposition of the appeal and, indeed, the Court of Appeal was free to ignore it. Under such circumstances, such a point raised on appeal does not, via the doctrine of collateral estoppel,[7] preclude subsequent

[6] Petitioner was represented by counsel in the state appellate court and did not participate in the preparation of the brief. Respondents filed no brief.

[7] Petitioner contended in the Court of Appeals that the state and federal actions involved two distinct causes of action rather than one, so that the applicable doctrine was collateral estoppel, rather than res judicata. See Petitioner's Opening Brief therein at 11; Respondents never controverted this assertion. The two causes of action were asserted to be based upon the recording of the notice of default on or about June 18, 1973 and the subsequent foreclosure sale on November 8, 1974.

litigation of the issue or become part of the law of the case. This has been the law for many, many years. *Fulton v. Hanlow*, 20 Cal. 450, 483 (1862); *Gyerman v. U.S. Lines*, 7 Cal. 3d. 488, 102 Cal. Rptr. 795, 498 P. 2d. 1043 (1972). Accordingly, an unqualified affirmance by the state Court of Appeal of a judgment below could neither expand nor contract the scope of that judgment.

Finally, and most importantly, California has adopted section 70 of the Restatement of Judgments, which provides:

> "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is *not* conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same matter or transaction; and in any event, it is not conclusive if injustice would result." (Emphasis added.)

Louis Stores, Inc., v. Department of Alcoholic Beverage Control, 57 Cal. 2d 749, 22 Cal. Rptr. 14, 371 P. 2d. 758 (1962); *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962).

IV.

The Record Is More than Sufficient to Permit Adjudication of the Constitutional Questions In This Court or on Remand

Respondents now contend that ". . . there are *no* circumstances under which [the questions of state action and due process] would come before this Court . . ." and that ". . . in light of the summary disposition below, however, the record is devoid of facts necessary to determine these questions, especially given the unique factual context of petitioner's case." Brief of Respondents at 13.

Petitioner cannot agree. The res judicata issue may be determined adversely to Respondents on any of several grounds, in this Court or in a lower court, after abstention is invoked and a ruling on the question is secured following appropriate state

court proceedings. At any point where it might be determined that the prior state court judgment is not res judicata as to the constitutional questions, such questions could then be adjudicated, either in this Court or in a lower federal court.

Nor is there anything "unique" in the facts of Petitioner's case, for, as a perusal of the California reported cases will show,[8] non-judicial foreclosures where the homeowner does not receive notice, and no notice is directed to the property sought to be foreclosed are quite common.[9]

As to the adequacy of the record, Petitioner reiterates once again that there are sufficient facts on the existing record in the District Court, or in the record in the state court of which this Court may take judicial notice, to adequately adjudicate the constitutional questions. The issue of state action is purely legal and involves an analysis of the relevant state statutes, state decisional law, and the procedures used by state and local officials in implementing the statute. A least in this case, additional facts are not necessary to a consideration of the state action question. In Petitioner's view, this is also true of the facts needed to decide, should the requisite state action be found, whether or not Petitioner was accorded notice consonant with the requirements of due process. In any event, should the Court find the record, supplemented by matters of which the Court can take judicial notice, inadequate, there are ample procedural devices for developing such additional facts as might be required, including, as Respondents suggest, remand to the District Court for additional findings.

V.

Factual Allegations Contained in Respondents Brief Which Are Erroneous, Irrelevant or Outside the Record Should Be Stricken

Respondents' brief contains numerous factual allegations which are dehors the record, erroneous, and in any event,

[8] See J. Hetland, *Secured Real Estate Transactions*, California Continuing Education of the Bar, 1974 (especially Ch. 8).

[9] See, e.g., *Lupertino v. Carbahal*, 239 Cal. App. 2d 605, 111 Cal. Rptr. 112 (1974).

irrelevant to the questions presented by the petition. Most of these allegations are being raised in Respondents' brief for the first time.[10] There were no factual disputes in the District Court or in the Court of Appeals.[11]

A complete, detailed, item by item examination of these factual allegations would be an imposition upon the Court's time. Moreover, Petitioner does not wish to distract the Court from the constitutional questions presented by the Petition, particularly in view of the fact that the factual allegations made by Respondents are irrelevant to those questions.

Accordingly, Petitioner replies to those assertions made by Respondents which appear to be particularly egregious in Appendix A. In so doing, Petitioner does not, of course, admit the validity of the remainder. Furthermore, since the factual allegations taken together amount to an unjustified personal attack on Petitioner, Petitioner and the attorneys of counsel herein request that they be stricken pursuant to Rule 40(5).

CONCLUSION

Respondents have presented no valid authority supporting their contention that the prior state court judgment is res judicata as to the substantial contitutional questions presented below. The Court has already granted certiorari this term to consider whether the foreclosure of certain warehousement's liens constitutes state action;[12] the question of state action presented by the instant petition is of like or greater public

[10] Respondents filed no brief in response to the Petition until, on September 14, 1977, the Clerk, acting on instructions from the Court, requested them to do so.

[11] The proceedings in the District Court were had pursuant to Respondents' motion for summary judgment. Even if such factual disputes had existed, all matters presented in connection with Respondents' motion would have been construed most favorably to Petitioner. Rule 56, F. R. Civ. P.; *U.S. v. Diebold*, 369 U.S. 654 (1962).

[12] *Flagg Bros. v. Brooks* (No. 77-25); *Lefkowitz v. Brooks* (No. 77-37); *American Warehousemen's v. Brooks*, (No. 77-42), 46 U.S.L.W. 3215.

importance. The writ should be granted under circumstances permitting the parties to submit briefs after the California Supreme Court has ruled on *Garfinkle* and its companion cases. Alternatively, should the Court feel that further clarification of the question of res judicata be necessary, the judgment below should be vacated, and the cause remanded to the District Court with directions to retain jurisdiction and abstain while the state law questions are litigated in state court, Petitioner being permitted to return to the District Court to litigate the constitutional questions in the event of a determination of the state law questions in his favor.

DATED: November 8, 1977

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APPENDIX A

Petitioner's Reply to Respondents' Factual Allegations

Page references, unless otherwise indicated, are to Respondent's Brief.

1. On page 4, Respondents allege that ". . . no such tender was made before or at any time after the expiration of this three month period." (Emphasis in the original.) Petitioner asks this Court to take judicial notice of the Reporter's Transcript at the trial in the prior state court proceedings, commencing at page 34, line 24, thereof. There, Respondent Ostrander testified as follows:

"Q. [By Petitioner's attorney, George Lydon]: Do you recall a tender of payment of some $4,000 being made to Twin Pines in the autumn of 1973? A. Yes, I do."

While Respondents ultimately rejected the tender as being insufficient in amount, and litigation commenced because Petitioner refused to pay the additional amounts demanded by Respondent Twin Pines, Twin Pines has never before, either in the lower federal courts, or in the prior state court proceeding, denied receiving the tender at all. The statement in Respondents' brief is thus incorrect.

2. On page 4, of Respondents' Brief at footnote 4, Respondents assert that "The Petition erroneously states that this notice was mailed on July 18, 1973 . . ." and then label this as "a serious distortion of the facts." The date cited is indeed incorrect, as Respondents claim; but the correct date, June 18, appears in the Superior Court complaint, appended to the Petition as Appendix F, and elsewhere in the petition. As set forth in the opinion of the Court of Appeals, Petitioner did not have actual notice of the impending foreclosure until July 17, 1973. It is quite clear from the context in which the erroneous date occurs, that the erroneous date was inadvertent.

3. On page 4, footnote 5, Respondents assert that Petitioner was "well aware" of the California request for notice procedure.[1]

[1] A description of the California request for notice procedure, mandated by section 2924b of the California Civil Code, can be found in *Hetland, supra*, at 144-145; 158-161.

In support of this contention, they assert that Petitioner has filed several such requests for notice distinct from those contained in the deed of trust involved in this litigation.[2]

In actual fact, Petitioner was unaware of the request for notice procedure referred to by Respondents and described in the footnote. Respondents, who have advised the Court of the existence of the requests for notice recorded by Petitioner have neglected to inform the Court that these notices were recorded on October 26, 1973, several months *after* the foreclosure proceedings and Superior Court action had been commenced. These requests, which are found at Reel 3541, Images 122, 123, and 124 of the Alameda County Recorder's records were recorded by Petitioner on instructions from his attorney, George A. Lydon and were intended to keep him informed of subsequent events affecting the property.

4. On page 6, Respondents contend that in the proceedings in the District Court, ". . . Petitioner attempted to relitigate the factual findings of the state trial court . . ." This is incorrect. As an examination of the record shows, both the complaint and amended complaint therein dealt with the constitutional questions alone. As set forth at 13, *supra*, there were no factual disputes in the federal trial or appellate courts.

Respondents' brief contains other misstatements of fact, particularly on page 3 thereof, but, for the reasons previously set forth, Petitioner does not, at this time advert to them. Petitioner will, of course, supply any factual material the Court may desire.

[2] Section 2924b is set out in the Petition, App. D. Standard California deeds of trust may or may not have a request for notice contained therein. Petitioner has heretofore requested the Clerk of the Court of Appeals to transmit a copy of the deed of trust in this case to the Court as an exhibit pursuant to Rule 21(1).